

FINANCIAL SERVICES AND THE WTO IN THE CONTEXT OF BREXIT

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Legal Briefings - By **Eric White, Consultant**

The EU Financial Affairs Sub-Committee of the House of Lords held a public meeting on financial services and the World Trade Organisation (WTO) on 13 March 2019. Eric White, a Consultant in the Brussels office of Herbert Smith Freehills gave evidence to the Sub-Committee as did Dr Lorand Bartels of the University of Cambridge.

The proceedings were [televised](#) and a transcript and a report with recommendations will be published in due course.

Their Lordships explored the scope of the EU and UK obligations in relation to financial services under the WTO Agreement and on free trade agreements.

The experts explained the scope and nature of WTO commitments in financial services and how free trade agreements have failed so far to significantly further liberalise the sector. They also discussed the meaning and scope of the so-called “prudential carve-out” (explaining that it is a broad exception, but still subject to conditions and justification).

Their Lordships were particularly interested in the role that equivalence could play in liberalisation and whether the EU’s MFN obligations under its existing free trade agreements would constitute an obstacle to an “enhanced equivalence” being agreed with the UK. The experts explained that these MFN obligations were generally conditional on similar circumstances prevailing and often excluded equivalence regimes.

They asked specifically whether a failure of the EU to adopt equivalence decisions in respect of the UK could be challenged under the WTO given that the UK is currently entirely aligned with EU rules.

Eric White explained that the WTO requires a WTO Member that exempts financial services and service suppliers from any other Members from its domestic requirements on the grounds that the requirements that they are subject to in their home markets are “equivalent” to the first Member’s requirements must provide all other WTO Members “adequate opportunity” to also demonstrate equivalence and benefit from such exemptions. In other words, although WTO Members are not required by the WTO Agreement to recognise equivalence for the financial regulations of other WTO Members, where they do have such equivalence regimes and accord equivalence in respect of some WTO Members, they must operate these equivalence regimes in a non-discriminatory manner.

In view of the fact that UK requirements would be identical to those applicable in the remaining EU immediately following Brexit, it would be difficult to find a justifiable basis to refuse equivalence in respect of the UK where equivalence decisions have been adopted with respect to other jurisdictions that have less close regulatory alignment to the EU. The fact that the UK would not be subject to EU institutional supervision following Brexit would not be a reason to refuse equivalence where this is not required in the case of other WTO Members.

Eric White expressed the view, shared by Dr Bartels, that the EU approach to equivalence does not appear to be in accordance with its GATS obligations. The EU seems to consider that the grant of equivalence is an entirely autonomous process that the EU operates in its own interests – to allow its financial operators to have access to services in other jurisdictions. The EU also appears to consider that it may terminate equivalence determinations as and when it pleases – as evidenced by the arbitrary time limits imposed on some recent equivalence decisions concerning Switzerland and the UK.

If the EU position were justified by genuine prudential concerns, the prudential exception may apply. However the Swiss decision appears to limit the duration of the recognition of equivalence in order to exert leverage over other negotiations taking place between the EU and Switzerland. The time limitations imposed on the equivalence decisions taken with respect to the UK show a desire to limit the recognition of equivalence to the temporary needs of EU financial institutions.

Their Lordships also enquired as to the effectiveness of the WTO regime. The experts agreed that although the WTO does impose limitations on the freedom of its Members to restrict trade including in financial services, it in no way provides guarantees available in a legal system such as that of the EU. There is no direct effect or power of injunction in the WTO system and only WTO Member States may bring enforcement action.

Even where it is clear that a Member has acted inconsistently with its obligations, this can only be made actionable by following dispute settlement. This will take time and the remedies are not retrospective. The offending Member will be entitled to a reasonable period of time to implement the findings of a panel.

Finally, the ultimate remedy that the WTO provides is retaliation – the withdrawal of equivalent concessions. The refusal to grant equivalence will therefore not necessarily disappear.

[More on Brexit](#)

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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